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Attorneys For Use Plaintiff Consolidated  
Electrical Distributors, Inc., dba CED Power

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA for the  
use and benefit of CONSOLIDATED  
ELECTRICAL DISTRIBUTORS, INC., a  
Delaware corporation, dba CED POWER,

Plaintiff,

vs.

NOVA GROUP, INC., a California  
corporation; FEDERAL INSURANCE  
COMPANY, an Indiana corporation; and  
LIBERTY MUTUAL INSURANCE  
COMPANY, a Massachusetts corporation,

Defendants.

Case No. 3:18-cv-01905-SB

PLAINTIFF'S MOTIONS TO BRING IN  
THIRD PARTIES OR TO DISMISS  
COUNTERCLAIMS

PARTIALLY UNOPPOSED

Request for Oral Argument

Request that Oral Argument be by telephone  
conference

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## **CERTIFICATION OF EFFORTS TO RESOLVE DISPUTE**

In compliance with LR 7-1(a), counsel for use plaintiff Consolidated Electrical Distributors, Inc., dba CED Power (“plaintiff” or “CED”) hereby certifies that the parties made a good faith effort through a telephone conference and e-mails to resolve the dispute and have been unable to do so. Specifically, defendants do not oppose CED’s motion to bring in third parties but do dispute CED’s motion to dismiss defendants’ counterclaims.

CED requests oral argument and that such oral argument be by telephone conference.

## **MOTIONS**

CED hereby moves, pursuant to FRCP 14, for leave to file a third-party complaint to bring third parties into this action and to have third-party summonses issued to the third-party defendants. In the alternative, pursuant to FRCP 12(b)(c), CED hereby moves for an order dismissing defendants’ counterclaims for failure to join a party under FRCP 19.

## **POINTS AND AUTHORITIES**

1. CED should be granted leave to file a third-party complaint to bring in third parties who furnished construction materials to CED, and to have third-party summonses issued and served.

As alleged in the complaint, CED furnished to defendant Nova at Nova’s request certain construction materials for the construction project at issue in this litigation. In turn, CED contracted with Industrial Electric Mfg., Inc. (“IEM”) and Resource Engineering Products, LLC (“REP”) to furnish such materials to CED. In its answer to the complaint, defendant Nova asserts counterclaims alleging CED furnished materials not in compliance with the construction project plans and

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specifications and/or did so in an untimely fashion, causing Nova damage. As the suppliers of the materials to CED, IEM and REP are or may be liable to CED for all or part of Nova's counterclaims against CED.

FRCP 14(b) provides as follows:

**When a plaintiff may bring in a third party.** When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

FRCP 14(a)(1) provides as follows:

**(1) Timing of the summons and complaint.** A defending party may, as third-party plaintiff, serve a summons and complaint on a non-party who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than fourteen days after serving its original answer.

The requirements of FRCP 14(b) have been satisfied because defendant Nova has asserted claims, specifically counterclaims, against CED. CED may bring in IEM and REP as third parties because, under FRCP 14(a)(1), defendant Nova would be allowed to bring in one or more third parties who are or may be liable to Nova for all or any part of a claim asserted against Nova. Therefore, CED's motion for leave to file a third-party complaint should be granted and the court clerk should issue third-party summonses for the third-party defendants. Attached hereto as Exhibit "A" is a draft of CED's proposed third-party complaint bringing in IEM and REP as third-party defendants.

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2. In the alternative, plaintiff is entitled to an order dismissing Nova's counterclaims because Nova has failed to join a party required under FRCP 19.

FRCP 19(a)(1) provides in pertinent part as follows:

**(1) Required party.** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

**(A)** In that person's absence, the court cannot accord complete relief among existing parties; ...

FRCP 12(b)(7) provides as follows:

**(b) How to present defenses.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

...

**(7)** Failure to join a party under rule 19.

In the present case, the court cannot accord complete relief among CED and defendant Nova, given their respective claims and counterclaims, without IEM and REP being joined as parties, because to the extent Nova prevails on its counterclaims, IEM and REP are liable fully or partially to CED for such counterclaims. Therefore, if the court does not grant CED's Motion for Leave to File a Third-Party Complaint, the court should dismiss defendant Nova's counterclaims for failure to join one or more parties under FRCP 19.

### CONCLUSION

Based on the foregoing, CED should be granted leave to file a third-party complaint having form and substance as set forth in Exhibit "A" hereto, and to have the court clerk issue third-party

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summons to the third-party defendants. In the alternative, defendant Nova's counterclaims should be dismissed pursuant to FRCP 12(b)(7).

DATED this 30<sup>th</sup> day of January, 2019.

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Of Attorneys for Use Plaintiff Consolidated Electrical  
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